72-160 FILE COPY

FILED
MAY 31 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-160

MAX GITMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

M. MICHAEL CRAMER
5454 Wisconsin Avenue, N.W.
Suite 1400
Washington, D.C. 20015

Counsel for Petitioner

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

Page

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3
STATEMENT OF THE CASE 5
REASONS WHY CERTIORARI SHOULD BE GRANTED 6
CONCLUSION 11
APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Ashe v. Swenson, 397 U.S. 436 (1970) 7
Brady v. Maryland, 373 U.S. 83 (1963) 8
Chandler v. Fretag, 348 U.S. 3 (1954) 11
Connelly v. D.P.P. (1964), AC 1254 7
Green v. United States, 355 U.S. 184, 187 (1957) 6
Harris v. Washington, 404 U.S. 55 (1971) 7
Rovario v. United States, 353 U.S. 53 (1957) 8
Stirone v. United States, 361 U.S. 212, 218 (1960) 9
United States v. Bergamo, 154 F.2d 31 (3d Cir., 1946) 11

Statutes and Regulations:

United States Constitution:

Amendment IV 3, 9

Amendment V 3, 7, 9

Amendment VI 3, 11

18 U.S.C. §1341 . . . . . 4, 5, 6

18 U.S.C. §3500(b) 4, 8

Miscellaneous:

ALI Model Penal Code, Proposed Official Draft §§1.07(2), 109(1)(b) 1962 7

C. Antieau, Modern Constitutional Law, Vol. I, 296 (1969) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. -

MAX GITMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 6, 1973.

OPINION BELOW

In a per curiam opinion (Appendix A), entered February 6, 1973, and not yet reported, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the trial court. An order recalling and

staying the mandate pending application for writ of certiorari was entered on March 28, 1973 (Appendix B).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 6, 1973 affirming the judgment of the United States District Court for the Eastern District of Virginia. An Order was entered by the United States Court of Appeals for the Fourth Circuit on March 28, 1973, recalling and staying the mandate pending application to this Court. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether trial in Virginia after petitioner had pled nolo contendere and was sentenced in Arizona on the basis of the same business activity violated the Fifth Amendment protection against double jeopardy.
2. Whether the prosecution's deceptive partial disclosure of *Jencks* material requires the exercise of this Court's supervisory power over federal criminal trials.
3. Whether the use of four grand juries to obtain an indictment nullifies the protection afforded an accused under the Fifth Amendment.
4. Whether the use at trial of documentary evidence seized without authority of warrant or subpoena violated the Fourth Amendment protections.
5. Whether denial of petitioner's motion for a continuance to obtain new counsel when he learned that counsel of his choice would not serve as trial counsel was an abuse of discretion in light of petitioner's Sixth Amendment right.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §3500(b):

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

STATEMENT OF THE CASE

Petitioner, Max Gitman, as president of Atlantic Associates, Inc., offered services for debt consolidation to subscribers throughout the United States. The corporation maintained offices in Phoenix, Arizona, and Providence, Rhode Island. In 1968, the petitioner, the corporation, and other individuals were indicted for mail fraud in violation of 18 U.S.C. §1341 on alleged offenses which occurred in Arizona and elsewhere in the United States.[1] In December 1969, petitioner entered a plea of nolo contendere which was accepted by the United States District Court of the District of Arizona as a guilty plea; petitioner was sentenced and incarcerated on or about January 20, 1969.

Thereafter, the United States conducted hearings before grand juries in Alexandria, Richmond, Newport News, and Norfolk, Virginia. An indictment was returned in Norfolk, Virginia, September, 1971, alleging inter alia violations of 18 U.S.C. §1341. The offenses charged in the second indictment relied on facts and the modus operandi which were the basis of the first indictment. In testimony on a preliminary motion, there was an acknowledgment by the Arizona United States Attorney that his office was aware of Atlantic Associates' activity in other states. As a result of the second indictment and trial, petitioner was convicted and sentenced to three years imprisonment and a fine of $5,000 on one count, and one year and a fine of $1,000 on each of 19 other counts. (The sentences on the latter counts were suspended and petitioner was placed on probation for

---

[1]Maryland, Missouri, Idaho, California, Mississippi, Texas, New Jersey, Florida, West Virginia, Virginia, Mexico, New York and Michigan.

five years.) The Government asserts that Mr. Gitman remains subject to prosecution in the remaining forty-eight states, although he has been twice punished for the same alleged offense.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

This case highlights the abuse of multiple prosecutions. The Constitutional guarantee "that the state with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"[2] has been patently violated.

In July 1968, petitioner was indicted in the United States District Court for the District of Arizona and charged with violation of 18 U.S.C. §1341 (Mail Fraud). The indictment enumerated as alleged victims persons residing in thirteen states[3] including most importantly, a resident of the Commonwealth of Virginia.[4] Acting upon what petitioner believed to be a firm assurance from two assistant United States attorneys that no further criminal prosecutions would be instituted against him arising out of the activities of Atlantic Associates, petitioner pled nolo contendere and was sentenced January 20, 1969.

---

[2]Green v. United States, 355 U.S. 184, 187 (1957).

[3]Maryland, Missouri, Idaho, California, Mississippi, Texas, New Jersey, Florida, West Virginia, Virginia, Mexico, New York and Michigan.

[4]Marvin Powers, Rt. 5, Bristol, Va.

Then, in September 1971, petitioner was indicted and subsequently tried and convicted in the Eastern District of Virginia for the same activity.

Clearly, if the "same transaction test"[5] recommended by the American Law Institute[6] and adopted by England[7] were applied, petitioner's trial in Virginia violated his protection against double jeopardy. Even applying "the same evidence test" petitioner's conviction should be set aside. In testimony and documentary evidence, the government did not limit itself to Virginia. Rather, there was testimony that debtors across the United States were allegedly defrauded, and business records of transactions in numerous other states were admitted into evidence. This same nationwide prosecutorial attack was made in Arizona. The ultimate issue, both in Arizona and Virginia was the modus operandi of the business. The names of the alleged victims had only secondary significance. By operation of collateral estoppel, a principle embodied in the Fifth Amendment, the issue once judicially decided should not have been raised again in Virginia.[8] Yet, the government asserts that the two prosecutions were proper and, if it so chooses, it can prosecute Mr. Gitman in all of the remaining jurisdictions.

---

[5]Ashe v. Swenson, 397 U.S. 436, 454 (1970) (Brennan, J. concurring).

[6]ALI Model Penal Code, Proposed Official Draft §§1.07(2), 109(1)(b) 1962.

[7]Connelly v. D.P.P. (1964), AC 1254.

[8]Harris v. Washington, 404 U.S. 55 (1971); Ashe v. Swenson, 397 U.S. 436 (1970).

II.

The deceptive prosecutorial conduct necessitates the exercise of this Court's supervisory power over federal criminal prosecutions. By agreement, the United States attorneys were to provide the defense with all *Jencks* material[9] the day before commencement of trial. Petitioner's counsel was provided with the transcript of the grand jury testimony of a former office manager of Atlantic Associates.[10] The defense considered this testimony favorable and anticipated similar testimony would be presented at trial. In fact, the United States attorneys knew the grand jury testimony was perjury and had in their possession for a period of six months an affidavit of this witness which disavowed the previous testimony. The defense was not presented with the affidavit until the witness testified and was caught by total surprise. In order to adequately prepare his defense and to assure a fair trial, the defendant, accused of a federal crime, was entitled to know that this witness became an informer.[11] This misleading disclosure and suppression violates due process of law in contravention of the policy enunciated in *Jencks* and *Brady*.[12]

III.

Grand juries should not be practice arenas for the government to test the effectiveness of its presentation. Here, grand juries in four cities were convened before a true bill was issued. After failing to obtain an indictment

---

[9] 18 U.S.C. §3500(b).

[10] Elliot Chavoor.

[11] Rovario v. United States, 353 U.S. 53 (1957).

[12] Brady v. Maryland, 373 U.S. 83 (1963).

from three grand juries, the government was able, before the Norfolk grand jury, to eliminate testimony unfavorable to its position and to allow one witness to summarize the prior testimony which would insure the return of a true bill. Economic considerations aside, the more important question is the perversion of the purpose of the Fifth Amendment requirement for presentment or indictment of a grand jury. The Founding Fathers explicitly accepted this English legacy mindful that English grand juries had refused to expose citizens to unjust or unnecessary prosecutions.[13] "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."[14] The malicious and oppressive action by the government of presenting this case to five grand juries (including the one in Arizona) frustrates the historical purpose and plain meaning of the Fifth Amendment.

IV.

This Court has repeatedly expressed concern for protecting persons from unwarranted intrusions into their privacy pursuant to the Fourth Amendment. Yet in this case, despite an admission at trial that a substantial number of documents seized from petitioner were obtained without a warrant and not pursuant to lawful

---

[13]For example, a grand jury in 1681 refused to indict Lord Shatsbury for treason in spite of insistent demands by the King; and grand juries protected citizens from Crown prosecutions in 1765 by refusing to indict Stamp Act rioters. *See C. Antieau, Modern Constitutional Law*, Vol. I, 296 (1969).

[14]Stirone v. United States, 361 U.S. 212, 218 (1960).

subpoena, these same documents were introduced into evidence. There did come a time when one of the grand juries issued a subpoena duces tecum for the records of Atlantic Associates. The subpoena was issued after the prosecution had benefited from the first seizure and it is submitted that the subpoenaed documents carried the taint of the prior illegal seizure.

The pertinent testimony of Inspector Crossman is set forth in the margin.[15] The Constitution requires that evidence obtained by Inspector Crossman should have been excluded.

V.

Petitioner retained, at great expense, a specific attorney well known for his trial ability. Mr. Gitman was advised that members of the firm would assist in trial preparation and preliminary matters but that the attorney retained would serve as trial counsel. Shortly before trial, Mr. Gitman was notified that an associate would try the case. The associate was immediately discharged and a continuance requested to secure new counsel. The request for a short continuance was denied, and the associate counsel was constrained to serve as trial counsel.

---

[15]Q. So, then, it is your testimony that the subpoena made out to Mr. Rosenfield, with the accompanying letter, made out to Mr. Rosenfield, was served upon Mr. Gitman after a substantial number of documents were in your custody?

A. That is correct.

Q. And I again ask you if at any time prior or subsequent to this subpoena being served on Mr. Rosenfield you advised Mr. Gitman of the possibility that these records could be used against him in a criminal proceeding.

A. No; I didn't.

This Court has interpreted the Sixth Amendment to guarantee every person accused of a crime the right to counsel of his own choice, and courts must give a defendant a reasonable opportunity to employ such counsel.[16] In federal courts, a person is able to retain counsel of his choice even though the particular attorney is not a member of the bar of the State in which the federal court is sitting.[17] The refusal of the lower court to grant a continuance to allow petitioner to employ an attorney of his own choosing was an abuse of discretion of constitutional proportion.

CONCLUSION

The interests of justice and the economy of judicial administration merit this Court's consideration and it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

M. MICHAEL CRAMER
Levitan, Ezrin, Cramer,
West & Weinstein
5454 Wisconsin Avenue, #1400
Washington, D.C. 20015
656-0915

Counsel for Petitioner

---

[16]*See* Chandler v. Fretag, 348 U.S. 3 (1954).

[17]United States v. Bergamo, 154 F.2d 31 (3d Cir., 1946).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Certiorari was mailed, postage prepaid, this ____ day of _____, 1973 to the Solicitor General, Department of Justice, Constitution Ave. between 9th & 10th Streets, N.W., Washington, D.C. 20530.

M. Michael Cramer

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2004

United States of America,

Appellee,

versus

Thomas H. Rosenfield,

Appellant.

No. 72-2005

United States of America,

Appellee,

versus

Max Gitman,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Argued January 9, 1973. Decided February 6, 1973.

PER CURIAM

After consideration of the briefs and oral argument, we find no reversible error affecting substantial rights in the convictions of the defendants for mail fraud.

Affirmed.

Before Haynsworth, Chief Judge and Winter and Craven, Circuit Judges.

John D. Schmidtlein (C.V. Spratley, Jr., on brief) for Appellant in No. 72-2004; William Mazel and Harold J. Goodman for Appellant in No. 72-2005; Rodney Sager, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee in Nos. 72-2004 and 72-2005.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2005

United States of America,

Appellee,

versus

Max Gitman,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
AT NORFOLK

Upon motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the mandate in this case is recalled and stayed pending disposition of application to the Supreme Court of the United States for a writ of certiorari.

A True Copy, T e s t e:
William K. Slate, II, Clerk
By /s/ Sharon Grubb
Deputy Clerk

For the Court - by Direction.

/s/ William K. Slate, II
CLERK